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ALEXANDER L. STEVAS,
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Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1953

FRED LEE DOSTER, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA CRIMINAL CASE

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Attorneys for Petitioner.

The R. L. Bryan Company, Legal Printers, Columbia, S. C.

QUESTION PRESENTED

Is it a deprivation of due process where a state court in a criminal prosecution prevents an accused from presenting evidence critical to his defense by ruling arbitrarily and mechanistically that such evidence is inadmissible under a general rule of evidentiary law, without hearing the proposed evidence in full or affording the accused the opportunity to proffer same out of the presence of the jury or *in camera* to the court for a determination of its competency, relevancy, and admissibility as an exception to the general evidentiary rule? *

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* The caption of the case contains the names of all parties.

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Supreme Court of the United States

OCTOBER TERM, 1980

No.

FRED LEE DOSTER, PETITIONER,

versus

THE STATE OF SOUTH CAROLINA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH CAROLINA CRIMINAL CASE

The petitioner prays that a Writ of Certiorari issue to review the decision and judgment of the Supreme Court of South Carolina, dated and entered in this case on March 4, 1981.

OPINIONS BELOW

The Court of General Sessions for Richland County, South Carolina filed no opinion. The opinion of the Supreme Court of South Carolina (App. 13) is not yet reported.

JURISDICTION

The judgment of the Supreme Court of South Carolina was dated and entered on March 4, 1981. Petition for rehearing was denied on March 24, 1981 (App. 22). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U. S. Constitution, Amendment XIV, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Petitioner, a resident of Georgia, was indicted by the grand jury in the Court of General Sessions of Richland County, South Carolina, charged on two counts: (1) With conspiracy to possess and distribute marijuana, and (2) with possession with intent to distribute marijuana. He was tried and found guilty on both counts.

Briefly, the following are the facts pertinent to this petition: On November 27, 1978 one George Anderson, a confidential informant (deceased at time of trial) acting under the direction and control of one Norman Shumard, a drug enforcement officer, and in his presence, made a telephone call to petitioner, requesting him to come to South Carolina. Pursuant to this call petitioner went to South Carolina where he met Anderson. They drove off in Anderson's automobile to an airport in South Carolina, where they picked up Shumard. Anderson drove to another area of the airport where he dropped off petitioner and Shumard. Anderson then drove away returning shortly thereafter to petitioner and Shumard. Upon his return, Anderson got out of his car, walked to the trunk and opened it in the presence of petitioner and Shumard. The open trunk revealed a plastic bag, containing marijuana. Petitioner was thereupon arrested by Shumard.

During the course of the trial, Mr. Eleazer, defense counsel, informed the Court that he proposed to call a witness who had a conversation with Anderson to establish the defense of entrapment as appears from the following:

TR, Page 113, Lines 9-25 (RT, Page 121, Lines 9-25) *

"Mr. ELEAZER: I anticipate that a witness may be called in the defense of the case tomorrow who would testify as to purported conversations that he had with George Ander-

* TR refers to Transcript of Record in Court below. RT refers to Reporter's Transcript.

son concerning his involvement in this case. I expect that if I try to get that testimony out which on its face may appear to be hearsay I will have some objection from the solicitor and if he has any objection to that testimony maybe we can get that straightened out at this time.

Mr. MCINTOSH: It's kind of hard for me to know. I haven't heard it. I don't know what it is going to be.

The COURT: You want to tell him what it is going to be?

Mr. ELEAZER: It's going to be testimony that an individual had a conversation with George Anderson and that in that conversation George Anderson stated that he purposely set up this defendant, that he planned the entire transaction in an effort to get back at this defendant for something that this defendant had done and virtually would establish the defense of entrapment."

During a hearing out of the presence of the jury, petitioner called as a witness, Jimmy W. Grimes, an attorney, to testify about a communication to him from Anderson relative to the defense of entrapment. Before testifying, Grimes stated his belief that what he was going to be called upon to testify was within the attorney-client privilege. After hearing only an incompleted portion of the proposed testimony of Grimes, the trial judge, on objection by the prosecution, mechanistically ruled that the communication was privileged, as appears from the following:

TR, Page 124, Line 9 through Page 125, Line 1 (RT, Page 134, Line 9 through Page 135, Line 1.)

"The COURT: All right, sir. Well, I am not going to allow the testimony because I feel that it was an attorney-client relationship and, of course, Mr. Grimes has testified that he felt that it was an attorney-client relationship and I do not deem it proper unless—that's subject to Mr. Grimes. If he is desirous of proceeding in the matter.

The WITNESS: Your Honor, my opinion is what the client or the decedent told me at that time has no bearing

on himself, any of his affairs, nor his guilt or innocence in any matter. The question that he asked me concerned primarily was whether or not under a given set of facts a single attorney could represent multiple defendants.

The COURT: Yes, sir. I understand what you are—

The WITNESS: The divulgence would not be—

The COURT: —saying but the fact as to whether or not it would be incriminating, that is not the test of whether or not an attorney-client privilege can be waived. I sustain your objection, Mr. McIntosh, in the matter."

Thereupon, defense counsel, raising the constitutional question of petitioner's right to due process, moved to proffer the entire proposed testimony of Grimes to the Court *in camera,* but on objection by the prosecution, the motion was denied, as appears from the following:

TR, Page 125, Lines 2-20 (RT, Page 135, Lines 2-20.)

"Mr. ELEAZER: Your Honor, we would proffer—

The COURT: Note it for the record, of course.

Mr. ELEAZER: We would proffer the testimony to the Court itself.

The COURT: All right, sir. Fine.

Mr. ELEAZER: Can we go into his testimony just to the Court and the court reporter?

The COURT: What say, Mr. McIntosh?

Mr. MCINTOSH: I object to it.

The COURT: Well, the problem you're getting into is that you are divulging it to do that, Mr. Eleazer.

Mr. ELEAZER: Divulging it only to Your Honor, only to the Court.

The COURT: Well, if it is in the record and it goes to the Supreme Court then the record in the Supreme Court transcript is not confidential.

Mr. ELEAZER: I understand that. That's the only way we can get it in and have the Supreme Court rule on it.

The COURT: All right. Well, I decline to grant your motion, sir."

No other evidence to establish the defense of entrapment was available to petitioner.

Upon a finding of guilty by the jury the petitioner was sentenced to a term of incarceration.

Appeal from the conviction and sentence was duly taken to the Supreme Court of South Carolina in which the constitutional issue of due process was raised on a case and exceptions which included, *inter alia,* the following exceptions:

TR, Pages 176-177 (Exception 7.)

"7. The trial judge committed prejudicial error in sustaining the State's objection to appellant's Proffer *in camera,* out of the presence of the jury, the testimony of Jimmy W. Grimes, an attorney, made on the ground that such testimony was privileged because of an attorney-client relationship, said error being that the appellant was deprived of the opportunity to establish that the testimony was not protected by the attorney-client privilege under circumstances where the client seeks the advice of an attorney to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime, fraud or entrapment."

TR, Page 178 (Exception 13.)

"13. The trial judge committed prejudicial error in sustaing the State's objection to appellant's proffer *in camera,* out of the presence of the jury the testimony of Jimmy W. Grimes, an attorney, made on the ground that such testimony was privileged because of an attorney-client relationship, said error being that appellant was thereby deprived of the opportunity to establish that the testimony proved the defense of entrapment."

TR, Page 178 (Exception 14.)

"14. The trial judge committed prejudicial error in sustaining the State's objection to appellant's proffer *in camera,* out of the presence of the jury the testimony of Jimmy W. Grimes, an attorney, made on the ground that such testimony was privileged because of an attorney-client relationship, said error being that appellant was thereby deprived of due process of law under the State and Federal Constitutions."

Upon appeal, the Supreme Court of South Carolina affirmed the conviction and sentence. In its opinion the Court below stated that it was not concerned with the relative merits of the substantive defense, but rather focused its concern upon the propriety of the ruling by the trial judge which petitioner alleged blocked his presentation of the entrapment defense and thus denied him a fair trial. Referring to a portion of Grimes' conclusory testimony, the Court below concluded that the trial judge did not abuse his discretion in ruling that the privilege extended to the communication between Anderson and Grimes.

The Court below did not stop there, however. It concluded that "There is no indication that Anderson sought advice to further a then on-going criminal or fraudulent scheme or for continuing tortious conduct. Those allegations were not raised." Yet nowhere in its otherwise detailed opinion was there any discussion about the exceptions on appeal to the Court below raising the issue of the attempted proffer to establish that the communication was in furtherance of criminal activity and fraud; nor was there any discussion about the issue raised in the trial court relating to the refusal of the trial judge to accept the proffer without which a meaningful appellate review could not have been had to determine whether Anderson's communication related to a then on-going criminal or fraudulent scheme; nor was there any discussion about the details of the com-

munication which defense counsel informed the Court he intended to establish by the proffer.

Petition for rehearing (App. 18) was filed on March 14, 1981, and denied on March 24, 1981 (App. 22).

REASONS FOR GRANTING THE WRIT

The decision herein is not in accord with the applicable decisions of this Court: The decision of the Court below is in direct conflict with the holding by this Court that the right of an accused to present evidence is essential to a fair hearing required by the Due Process Clause; that this right becomes particularly fundamental when the proceeding allegedly results in a finding that a particular individual was guilty of a crime; and when constitutional rights directly affecting the ascertainment of guilt are implicated, an evidentiary rule may not be applied mechanistically to defeat the ends of justice.

Chambers v. Mississippi, 410 U.S. 284 (1973).
Cool v. United States, 409 U.S. 357 (1972).
Jenkins v. McKeithen, 395 U.S. 411 (1969).
Washington v. State of Texas, 388 U.S. 14 (1967).
In Re Oliver, 333 U.S. 257 (1948).

In each case the question before this Court was whether the exercise of the right of an accused to present evidence may be obstructed by the action of a court in excluding as inadmissible such evidence—critical to a defense—by mechanistically applying a general principle of evidentiary law in disregard of an exception thereto or without affording the accused the opportunity to present such evidence to establish its admissibility under an applicable exception to the general evidentiary rule.

The rationale of the foregoing cases applies with equal force to the instant case which presents the same general problem. Petitioner defended the charge against him on the

ground of entrapment, claiming that he had been lured to commit the alleged crime by the confidential informant, Anderson, working under the direction of law enforcement officers. In support of this defense petitioner proposed to introduce testimony from one Grimes, an attorney, of a communication made by Anderson in furtherance of criminal activity and the perpetration of a fraud upon petitioner. When Attorney Grimes expressed his conclusory opinion that the communication was made in the course of an attorney-client relationship, the trial judge arbitrarily excluded as inadmissible his testimony critical to the defense by mechanistically applying the general rule of privileged communications between attorney and client. This action was taken by the Court without hearing the proposed testimony in its entirety or affording the accused the oportunity to proffer the entire proposed testimony to the Court *in camera* to establish that the communication was made in furtherance of criminal activity or fraud and was thus admissible as falling within the exception to the general rule of privileged communications.

The true effect of the holding by the Court below would permit state courts to do indirectly that which under the Due Process Clause it is prohibited from doing directly, by summarily and mechanistically applying general rules of evidentiary law to exclude evidence—critical to the defense—without giving an accused the opportunity to establish that the proposed evidence falls within and is admissible as an exception to a general evidentiary rule. It would thus defeat the ends of justice and deny an accused his fundamental right to present relevant and competent evidence in violation of the Due Process Clause under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

It is therefore respectfully submitted that the Court below, by refusing the proffer of Grimes' testimony, deprived the petitioner of the right to present his defense, contrary to the Due Process right of an accused under the Fifth, Sixth and Fourteenth Amendments to the Constitution.

CONCLUSION

For the foregoing reasons this Court should grant the petition for a Writ of Certiorari, should reverse the judgment of the Court below, and should order the Court below to remand the case to the trial court for a new trial.

Respectfully submitted,

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APPENDIX

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The State of South Carolina
IN THE SUPREME COURT

THE STATE, Respondent,

versus

FRED LEE DOSTER, Appellant.

Appeal from Richland County
Rodney A. Peeples, Judge

Opinion No. 21399
Filed March 4, 1981

AFFIRMED

Howard Hammer, of Hammer & Bernstein, of Columbia, for appellant.

Attorney General Daniel R. McLeod, Assistant Attorneys General Kay G. Crowe and Russell D. Ghent and Solicitor James C. Anders, all of Columbia, for respondent.

Harwell, A. J.: Fred Lee Doster appeals his conviction for conspiracy to possess and distribute marijuana and possession with intent to distribute marijuana.

In mid-November of 1978, Norman Shumard of the Federal Drug Enforcement Administration had a series of meetings with one George Anderson, an unpaid, non-police, confidential informant. On November 27, Shumard had Anderson come by the local DEA office in Columbia to telephone the contact Anderson claimed to have in a marijuana operation. Anderson consented to having the telephone conversation recorded. Testimony at trial subse-

quently revealed that the number dialed was that of Doster's motel and residence. Shumard identified the voice on the telephone, as recorded, as that of Doster. The conversation concerned plans for a meeting to have 100 pounds of marijuana delivered for a payment of $30,000.

The next evening Shumard met Anderson and Doster at Owens Field Airport in Columbia. Shumard's cover story was that he was purchasing marijuana for delivery to New York. The three went to a remote area in the airport where Shumard had an aircraft ostensibly waiting. Doster was shown a "flash roll" of money. Apparently satisfied, Doster, according to Shumard, instructed Anderson to go back to "the place" and transfer the marijuana from another car and then come back.

Other law enforcement agents assigned to the case had Anderson under surveillance from the time he left the airport. They testified that Anderson drove towards Lexington but exited on a dirt road off the ramp between Highway 378 and Interstate 20. After a few minutes, the Anderson car emerged followed closely by another vehicle. The other vehicle followed Anderson's car all the way back to Owens Field and parked within one hundred yards of the rendezvous point.

Anderson, upon his return, opened the trunk of his car and thereby revealed two plastic and paper covered bales and one plastic bag containing approximately 100 pounds of marijuana. Shumard immediately arrested Doster. Other agents in the area then apprehended the driver of the second vehicle, identified as Michael Wayne Doster, the 19 or 20 year old son of the appellant. Search of the second vehicle turned up a loaded handgun and, in the trunk, a plastic bag with marijuana in it as well as marijuana residue scattered about the trunk.

During the course of the trial, counsel for appellant expressed an intent to pursue an entrapment defense. Counsel informed the trial court that the defense hoped to demonstrate that Anderson concocted the entire marijuana scheme in an effort to ensnare Doster and thus accomplish some sort of vengeance on him. The matter was complicated by the fact that Anderson was deceased at time of trial.

We are not concerned here with the relative merits of the substantive defense. Our focus is instead upon the propriety of a ruling of the trial judge which appellant Doster alleges blocked his presentation of the entrapment defense and thus denied him a fair trial.

During a hearing held out of the presence of the jury, the defense called Jimmy W. Grimes, an attorney whom Anderson had consulted with. The defense wished to question Grimes concerning matters related to him by Anderson. Grimes, before testifying, stated that what he was going to be called upon to testify on was within the attorney-client privilege.

The attorney-client privilege has long been recognized in this State. The privilege is based upon a public policy that the best interest of society is served by promoting a relationship between the attorney and the client whereby utmost confidence in the continuing secrecy of all confidential disclosures made by the client within the relationship is maintained. The privilege belongs to the client and, unless waived by him, survives even his death. *South Carolina State Highway Department v. Booker,* 260 S. C. 245, 195 S. E. 2d 615 (1973). Generally, the party asserting the privilege must raise it. *State v. Love,* —— S. C. ——, 271 S. E. 2d 110 (1980).

Many jurisdictions strictly construe the privilege. 81 Am. Jur. 2d Witnesses § 174, at 210. The reasoning behind the strict construction is that evidence excluded under the privilege is not necessarily incompetent. See generally, McCormick, Handbook of the Law of Evidence, §§ 87, *et. seq.* (2d Ed. 1972.)

We agree that the privilege must be tailored to protect only confidences disclosed within the relationship. The essential elements giving rise to the privilege were stated by Wigmore to be:

> "(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure

by himself or by the legal adviser, (8) except the protection be waived." 8 Wigmore, Evidence § 2292 (McNaughton rev. 1961)

Not every communication within the attorney and client relationship is privileged. The public policy protecting confidential communications must be balanced against the public interest in the proper administration of justice. *N.L.R.B. v. Harvey,* 349 F. 2d 900 (4th Cir. 1965); *Seplar v. State,* 191 So. 2d 588 (Fla. App. 1966). This is exemplified by the widely recognized rule that the privilege does not extend to communications in furtherance of criminal, tortious or fraudulent conduct. *United States v. United Shoe Machinery Corporation,* 89 F. Supp 357 (D. Mass. 1950); 125 A. L. R. 508; 16 A. L. R. 2d 1029.

We recently stated in *State v. Love, supra,* that:

"Whether a communication is privileged is for the trial judge to decide in the light of a preliminary inquiry into all of the facts and circumstances; and this determination by the trial judge is conclusive in the absence of an abuse of discretion. 81 Am. Jur. 2d Witnesses, Section 222."

The court must determine the question of privilege without first requiring disclosure of the substance of the communication. *Steiner v. United States,* 134 F. 2d 931 (5th Cir.), cert. denied, 319 U. S. 774, 63 S. Ct. 1439, 87 L. Ed. 1721 (1943); *Miller v. Anderson,* 30 Conn. Sup. 501, 294 A. 2d 344 (1972); *Harrison v. State,* 276 Md. 122, 345 A. 2d 830 (1975); C. J. S., Witnesses § 305 at 848.

When Grimes took the stand both sides as well as the court questioned him in regard to his attorney-client relationship with Anderson. Grimes testified that Anderson was not a prior client and had never paid him for legal services. He said that Anderson wanted an opinion on whether another attorney would have a conflict in some matter. Grimes was chosen as a third party to avoid disclosure to the attorney concerned. Asked by the court, Grimes again expressed his belief that the attorney-client relationship existed. On cross-examination, Grimes testified that the con-

versation was in his law office and that Anderson sought him out as a lawyer to give him a legal opinion. He further volunteered:

> "Your Honor, my opinion is what the client or the decedent told me at that time has no bearing on himself, any of his affairs, nor his guilt or innocence in any matter. The question that he asked me concerned primarily was whether or not under a given set of facts a single attorney could represent multiple defendants."

The trial judge then ruled that the privilege extended to the communication between Anderson and Grimes.

We do not believe the trial judge abused his discretion under these circumstances. As stated, generally the party asserting the privilege must establish the confidential nature of the communication. Here though the privilege holder was deceased, we recognize the appropriateness of his attorney asserting the privilege on his behalf.

There is no indication that Anderson sought advice to further a then on-going criminal or fraudulent scheme or for continuing tortious conduct. Those allegations were not raised. It is clear that appellant was not denied a right to establish his defense, he was merely denied the license to fish into privileged communications. Doster had the right to present his affirmative defense by whatever means remained available to him.

All remaining issues are disposed of under our Rule 23 since no error is shown and full discussion would be of no precedential value.

Affirmed.

LEWIS, C. J., LITTLEJOHN, NESS and GREGORY, JJ., concur.

The State of South Carolina
IN THE SUPREME COURT

THE STATE, Respondent,

versus

FRED LEE DOSTER, Appellant.

Appeal from Richland County
The Honorable Rodney A. Peeples, Presiding Judge

Opinion No. 21399
Filed March 4, 1981

AMENDED PETITION FOR REHEARING

To the Honorable Chief Justice and Justices of the Supreme Court:

Your petitioner, the appellant, respectfully prays that this Court grant a rehearing of its decision of March 4, 1981 affirming the judgment of the conviction, upon the following grounds:

FIRST

The decision of this Court affirming the action of the trial judge in refusing to allow the witness, Jimmy W. Grimes, an attorney, to testify on behalf of the defendant in regard to the issue of entrapment of the defendant was obviously based upon the expression of belief by the witness Grimes that the attorney-client relationship existed. In reaching this conclusion, this Court apparently overlooked that defendant was denied, in violation of due process

under the Fourteenth Amendment to the Constitution, the opportunity to proffer out of the presence of the jury or *in camera*, testimony from the witness Grimes, to establish (1) that there was no attorney-client relationship between the attorney and George Anderson, the informant working under direction of law enforcement officers, and (2) that if such relationship existed, the communication was in furtherance and intended to foster the perpetration of fraud or criminal activity and, therefore, was not privileged, as appears from the following Transcript of Record:

Page 113, Lines 9 through 12; (Reporters Transcript, Page 121, Lines 9-12):

"Mr. ELEAZER: I anticipate that a witness may be called in the defense of the case tomorrow who would testify as to purported conversations that he had with George Anderson concerning his involvement in this case. . . ."

Page 113, Lines 19 through 25; (Reporters Transcript, Page 121, Lines 19-25):

"The COURT: You want to tell him what it is going to be?

Mr. ELEAZER: It's going to be testimony that an individual had a conversation with George Anderson and that in that conversation George Anderson stated that he purposely set up this defendant, that he planned the entire transaction in an effort to get back at this defendant for something that this defendant had done and virtually would establish the defense of entrapment."

Page 125, Lines 4 through 21; (Reporters Transcript, Page 135, Lines 4-21):

"Mr. ELEAZER: We would proffer the testimony to the Court itself.

The COURT: All right, sir. Fine.

Mr. ELEAZER: Can we go into his testimony just to the Court and the court reporter?

The COURT: What say, Mr. McIntosh?

Mr. MCINTOSH: I object to it.

The COURT: Well, the problem you're getting into is that you are divulging it to do that, Mr. Eleazer.

Mr. ELEAZER: Divulging it only to Your Honor, only to the Court.

The COURT: Well, if it is in the record and it goes to the Supreme Court then the record in the Supreme Court transcript is not confidential.

Mr. ELEAZER: I understand that. That's the only way we can get it in and have the Supreme Court rule on it.

The COURT: All right. Well, I decline to grant your motion, sir."

SECOND

In concluding that the communication between Attorney Grimes and George Anderson was privileged, the Court overlooked that the privilege did not attach to said communication because it had been divulged by Attorney Grimes to Mr. Eleazer, trial counsel, as shown by the statement made by Attorney Eleazer as an officer of the Court which appears in the Transcript of Record, as follows:

Page 113, Lines 19 through 25; (Reporters Transcript, Page 121, Lines 19-25):

"The COURT: You want to tell him what it is going to be?

Mr. ELEAZER: It's going to be testimony that an individual had a conversation with George Anderson and that in that conversation George Anderson stated that he purposely set up this defendant, that he planned the entire transaction in an effort to get back at this defendant for something that this defendant had done and virtually would establish the defense of entrapment."

For the foregoing reasons and those set forth in the brief filed by appellant, it is respectfully urged that a rehearing be granted and, that upon such rehearing, the judgment of conviction be reversed and the cause be remanded with directions to the lower Court to grant a new trial.

Respectfully submitted,

HAMMER AND BERNSTEIN,
By: HOWARD HAMMER,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I, Mark L. Archer, Attorney at Law, practicing in Columbia, South Carolina, do hereby certify that it is my professional opinion that there is merit in the grounds of the amended petition for rehearing. I am not concerned as counsel in this case.

Respectfully submitted,

MARK L. ARCHER,

The Supreme Court of South Carolina

FRANCES H. SMITH
CLERK

P. O. BOX 11330
COLUMBIA, S. C. 29211

March 25, 1981

Howard Hammer, Esquire
Messrs. Hammer & Bernstein
1018 Assembly Street
Columbia, South Carolina 29201

Re: The State v. Fred Lee Doster

Dear Mr. Hammer:

The Court has refused your Petition for Rehearing in the above case in the following order:

"Petition denied.

/s/J. WOODROW LEWIS, C.J.,
/s/BRUCE LITTLEJOHN, A.J.,
/s/J. B. NESS, A.J.,
/s/GEORGE T. GREGORY, JR., A.J.,
/s/DAVID W. HARWELL, A.J."

The Court today granted your Motion to Stay Remittitur and Continue Appeal Bond by endorsing the following order thereon:

"Petition Granted.

/s/DAVID W. HARWELL, A.J.,"
For the Court.

Very truly yours,

REBA D. MIMS,
Deputy Clerk.

RDM/rl

cc: The Honorable Russell D. Ghent

Office - Supreme Court, U.S.
FILED
OCT 13 1981
ALEXANDER L. STEVAS,
CLERK

80-1953

In the Supreme Court of the United States

OCTOBER TERM, 1980

No.

FRED LEE DOSTER,
PETITIONER

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

NO.

FRED LEE DOSTER,
PETITIONER

versus

STATE OF SOUTH CAROLINA,
RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The opinion of the South Carolina Supreme Court is reported in Opinion No. 21399, filed March 4, 1981, as reproduced in the Petitioner's Appendix at pages 13-17.

JURISDICTION

Respondent does not question the Court's jurisdiction in this proceeding.

QUESTION PRESENTED

I.

Did the South Carolina Supreme Court properly conclude that the trial judge properly, in his discretion, excluded certain testimony which was subject to the attorney-client privilege and which was irrelevant toward establishing Petitioner's asserted entrapment defense?

STATEMENT OF CASE

Petitioner was convicted in the Court of General Sessions for Richland County, South Carolina, of the offenses of conspiracy to possess and distribute marijuana and possession with intent to distribute maurjuana.

The evidence introduced by the State proved that, on November 17, 1978, Mr. George Anderson, deceased, made a telephone call to Petitioner as a confidential informant acting on behalf of an agent for the Drug Enforcement Administration of the United States Department of Justice. The tape recorded conversation centered around Mr. Anderson's request that Petitioner deliver to him 100 pounds of marijuana. On November 27. 1978, Petitioner met with Mr. Anderson and the DEA agent, Mr. Norman Schumard, in Columbia, South Carolina, for the purpose of effecting the delivery of the 100 pounds of marijuana. When Agent Schmard displayed to Petitioner $30,000 cash (the agreed price for the 100 pounds of marijuana), Mr. Doster told Mr. Anderson "go back to the place, transfer the marijuana to this car and then come back here." Mr. Anderson left and returned in an automobile containing the marijuana in the trunk. When the DEA agent looked into the trunk, Petitioner stated words to the effect. "There it is. Let's get this over with. Let me get out of here." At that point Petitioner was arrested on the charges for which he was convicted.

The only testimony which Petitioner offered to support his assertion of entrapment was the testimony of Mr. Jimmy Grimes, an attorney who had given Mr. George Anderson certain legal advice. It is undisputed that Mr. Anderson sought this legal advice in December, 1978, or January, 1979, after the Petitioner's arrest had taken place and the drug conspiracy had been ended. (See Appendix). Although Petitioner's counsel, in his proffer of proof, asserted that Mr. Grimes would testify that Mr. Anderson admitted to "setting up" Mr. Doster, the witness, in fact, stated to the Court that the conversation was within the attorney-client privilege and that, in any event, the confidence had no bearing on Mr. Anderson, on any of his affairs, or on his guilt or innocence in any matter. (See Appendix). Apparently, the advice which Mr. Anderson sought dealt with "whether or not under a given set of facts a single attorney could represent multiple defendants." Contrary to Petitioner's argument in his Petition, the communication was never alleged to have taken place in the course of the perpetration of a fraud or in the course of the conspiracy in the case.

The Petitioner elected not to testify at trial. He did choose to appeal his conviction to the South Carolina Supreme Court and it was affirmed on March 4, 1981, where the South Carolina Supreme Court fully reviewed the merits of Petitioner's claim.

ARGUMENT

I.

The South Carolina Supreme Court correctly ruled that the trial judge properly exercised his discretion in refusing to admit into evidence the testimony of Mr. Jimmy Grimes, attorney at law, inasmuch as his testimony would have involved a privileged attorney-client communication and because the substance of the communication would have had no bearing on the asserted claim of entrapment; in any event, the evidence of Petitioner's guilt was overwhelming and exclusion of the proffered testimony could not have been prejudicial. **(Petitioner's Question I.)**

Much of Petitioner's argument is simply without factual support in the record. He essentially claims that his rights to due process of law under the United States Constitution were violated because the trial court did not allow him to "establish that the communication was made in furtherance of criminal activity or fraud and was thus admissible as falling within the exception to the general rule of privileged communications." (See Petition, page 9.) This contention was never raised in the trial court essentially because the communication had taken place subsequent to Petitioner's arrest and the termination of the conspiracy. Petitioner's trial counsel only claimed that Mr. Anderson's communication to Jimmy Grimes was not within the scope of the attorney-client privilege, a contention which his counsel now concedes by claiming now that the communication could have been in furtherance of on-going criminal activity. Consequently, this issue is not properly before this Court because it is deemed to be waived under South Carolina procedural rules by failure to present it to the trial court. See *State v. Meyers*, 262 S.C. 222, 203 S.E. 2d 678 (1974); *Taylor v. State*, 258 S.C. 369, 188 S.E. 2d 850 (1972). See cases collected in 7A West's South Carolina Digest, *Criminal Law*, Key Nos. 1043 (3); 1178.

Assuming, for the sake of argument, that this issue has been properly preserved for review, Respondent would respectfully submit that Mr. Anderson's communication to Mr. Grimes could not have been subject to an exception to the attorney-client privilege since it was made subsequent to the termination of the conspiracy, and it only related to whether an attorney would have a conflict of interest in representing multiple defendants under a certain set of facts. The substance of the communication as volunteered by Mr. Grimes completely refuted trial counsel's assertion that it would constitute an admission which would establish the defense of entrapment. Contrary to Petitioner's argument, the record before the South Carolina Supreme Court was more than sufficient to establish the existence of an attorney-client privilege without a recognized exception. Certainly, the glaring difference between trial counsel's proffer and Mr. Grimes' statement as to the substance of the conversation proved that it

would have been of no relevance in establishing the entrapment defense. This record evinces no attempt to thwart the ends of justice by excluding evidence critical to a defense; rather, it demonstrates the proper exercise of the State court's authority in enforcing evidentiary rules necessary to the appropriate administration of the judicial system. The South Carolina Supreme Court has applied this evidentiary rule of law in a manner consistent with prior cases on the subject. *Cf. South Carolina State Highway Department v. Booker,* 260 S.C. 245, 195 S.E. 2d 615 (1973) and *State v. Love,* ___ S.C. ___, 271 S.E. 2d 110 (1980).

Finally, Respondent would respectfully submit that in the face of the overwhelming evidence of guilt introduced against Petitioner in the form of a recorded conversation arranging for the delivery of 100 pounds of marijuana and the DEA agent's testimony concerning the actual delivery of the marijuana, no prejudice could have enured to Petitioner's rights by excluding a rather innocuous question about an attorney's conflict of interest in representing multiple clients.[1] See *Schneble v. Florida,* 405 U.S. 427, 31 L. Ed. 2d 340, 92 S. Ct. 1056 (1972).

[1]This argument was presented to the South Carolina Supreme Court in the State's brief, although that tribunal did not appear to rely upon it in its Opinion.

CONCLUSION

For the foregoing reasons, Respondent submits that Petitioner's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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LINDY P. FUNKHOUSER
Assistant Attorney General

ATTORNEYS FOR RESPONDENT.

APPENDIX

MR. ELEAZER: I anticipate that a witness may be called in the defense of the case tomorrow who would testify as to purported conversations that he had with George Anderson concerning his involvement in this case. I expect that if I try to get that testimony out which on its face may appear to be hearsay I will have some objection from the solicitor and if he has any objection to that testimony maybe we can get that straightened out at this time.

MR. MCINTOSH: It's kind of hard for me to know. I haven't heard it. I don't know what it is going to be.

THE COURT: You want to tell him what it is going to be?

MR. ELEAZER: It's going to be testimony that an individual had a conversation with George Anderson and that in that conversation George Anderson stated that he purposely set up this defendant, that he planned the entire transaction in an effort to get back at this defendant for something that this defendant had done and virtually would establish the defense of entrapment.

THE COURT: All right, sir. Do you want to wait till you hear the testimony to argue it Mr. Mac or —

MR. MCINTOSH: Yes, sir.

THE COURT: Do you want to argue it now?

MR. MCINTOSH: I'd rather wait till I hear who the witness is, when, and where the conversation was supposed to have took place. (Tr., p. 113, Line 9 — p. 114, line 7.)

* * *

MR. ELEAZER: May it please the Court, we call Jimmy Grimes as a witness.

THE COURT: Come around, please. Put your left hand on the Bible and raise your right.

JIMMY W. GRIMES

Having been first duly sworn as a witness, was examined and testified as follows:

THE COURT: Be seated. State your name for the record.

THE WITNESS: Jimmy W. Grimes. Your Honor, if it please the Court, I need a ruling on this before I testify. I am an attorney. What I am about to testify to was told to me within the attorney-client privilege.

THE COURT: Yes, sir.

THE WITNESS: The client is now deceased.

THE COURT: Yes, sir.

MR. MCINTOSH: If Your Honor please, the privilege belongs to the client. It doesn't belong to the attorney.

THE COURT: Exactly.

MR. ELEAZER: The client can no longer claim the privilege. He is deceased. It can't hurt him.

THE COURT: That doesn't change it from being an attorney-client privilege. I'll be glad to consider any authority you have, sir. That's just my understanding of the law where there is a relationship between an attorney and a client. Only the client can waive that privilege and allow the attorney to testify. The fact that the client is deceased, that doesn't mean that it is a matter of public record or public information. The fact he can't be hurt from it I don't —

MR. ELEAZER: May it please the Court?

THE COURT: Yes, sir.

DIRECT EXAMINATION

BY MR. ELEAZER:

Q. On that particular point, Mr. Grimes, the testimony you are about to give is related to George Anderson. Is that correct?

A. That's correct.

Q. Had you ever in the past represented George Anderson?

A. George Anderson? No, sir.

Q. Had you ever been retained to represent George Anderson?

A. No, sir.

Q. Had George Anderson ever kept an appointment with you at your office?

Q. Now when you answer that question, I ask you, Mr. Grimes, if on the particular occasion in question whether or not he had an appointment or whether he just showed up in your office on that occasion?

A. It's my understanding that he called and said he might be by. There was no definite time. I can't recall at this time — it's been six months or more — whether or not he was actually on the calendar to come in at a given hour or whether he just happened to come into the office.

Q. All right, sir. And this conversation that you say may be privileged, when did that take place?

A. It was in late '78 or early '79, December or January this past.

Q. Has Mr. George Anderson ever paid you any sums of money for representation?

A. No.

Q. Did you ever undertake to represent him in any legal matter whatsoever?

A. No.

Q. Did you merely on this occasion listen to Mr. Anderson's story and advise — and give him no legal advice whatsoever?

A. He had a situation that he wished for me to give him an opinion as to whether another attorney would have a conflict of interest and the reason he was at my office was he could not disclose this matter to the other attorney at that time.

Q. All right, sir. So you just gave him a legal opinion as to what his situation was. Is that correct?

A. That's correct.

Q. After hearing his story. Is that correct?

A. That's correct.

Q. And he paid you no sums of money whatsoever?

A. That's correct.

Q. And you undertook in no sense to represent him in any matter. Is that correct?

A. That's correct.

MR. ELEAZER: Your Honor, I would submit that the conversation with Mr. Anderson was not within the attorney-client privilege.

THE COURT: All right. Well, now, Mr. Eleazer, often times I gave free advice to people for which I was not paid where an attorney-client privilege existed. However, I think the attorney — the Court is not going to abdicate its responsibility to make a ruling in the matter but I ask you, Mr. Grimes, do you consider to have had an attorney-client relationship with George Anderson at the time in question and concerning or pertaining to the information which you gave to him?

THE WITNESS: Yes, sir.

THE COURT: I will be glad to hear from you, Mr. McIntosh.

MR. MCINTOSH: May I ask the witness just one or two questions?

THE COURT: As many as you like, please.

CROSS EXAMINATION

BY MR. MCINTOSH:

Q. This conversation took place at your law office, Mr. Grimes?

A. Yes, sir.

Q. And he came to see you as an attorney?

A. Yes.

Q. And he sought a legal opinion from you?

A. Yes.

MR. MCINTOSH: That's all I have.

RE-DIRECT EXAMINATION

BY MR. ELEAZER:

Q. Mr. Grimes, would the legal opinion he sought have any effect on any of his legal rights?

A. No.

Q. It would be strictly a question as to whether or not there was a conflict in representation with another lawyer?

A. That's correct.

Q. And it was not legal advice which he himself could act or rely upon? Is that correct?

A. That's correct.

MR. ELEAZER: Your Honor, we would submit it is not within the privilege.

MR. MCINTOSH: If Your Honor please, I believe the law is clear. It makes no difference whether an attorney is paid a fee or whether he undertakes representation. If a client comes to see a lawyer in his capacity as a lawyer and seeks legal advice the attorney-client privilege attaches at that time. It matters not whether a fee is paid or representation is undertaken.

THE COURT: Anything further, Mr. Eleazer?

MR. ELEAZER: Your Honor, I would submit that he asked for an opinion as far as representation but sought no legal advice in his private individual capacity and, or course, I understand that payment of a legal fee is not one of the things to be considered but I think it goes to the fact that there was no legal fee paid, that there was no representation, that he took on no job for him, that he gave him no legal advice per se but merely rendered an opinion as to whether or not he could use a different lawyer.

THE COURT: All right, sir. Well, I am not going to allow the testimony because I feel that it was an attorney-client relationship and, of course, Mr. Grimes has testified that he felt that it was an attorney-client relationship and I do not deem it proper unless — that's subject to Mr. Grimes. If he is desirous of proceeding in the matter.

THE WITNESS: Your Honor, my opinion is what the client or the decedent told me at that time has no bearing on himself, any of his affairs, nor his guilt or innocence in any matter. The question that he asked me concerned primarily was whether or not under a given set of facts a single attorney could represent multiple defendants.

THE COURT: Yes, sir. I understand what you are —

THE WITNESS: The divulgence would not be —

THE COURT: — saying but the fact as to whether or not it would be incriminating, that is not the test of whether or not an attorney-client privilege can be waived. I sustain your objection, Mr. McIntosh, in the matter.

MR. ELEAZER: Your Honor, we would proffer —

THE COURT: Note it for the record, of course.

MR. ELEAZER: We would proffer the testimony to the Court itself.

THE COURT: All right, sir. Fine.

MR. ELEAZER: Can we go into his testimony just to the Court and the court reporter?

THE COURT: What say, Mr. McIntosh?

MR. MCINTOSH: I object to it.

THE COURT: Well, the problem you're getting into is that you are divulging it to do that, Mr. Eleazer.

MR. ELEAZER: Divulging it only to Your Honor, only to the Court.

THE COURT: Well, if it is in the record and it goes to the Supreme Court then the record in the Supreme Court transcript is not confidential.

MR. ELEAZER: I understand that. That's the only way we can get it in and have the Supreme Court rule on it.

THE COURT: All right. Well, I decline to grant your motion, sir.

MR. ELEAZER: Very good, sir. Come down, Mr. Grimes.

(Witness excused.)

MR. ELEAZER: One further question of Mr. Grimes, please.

THE COURT: You are still under oath. Just ask him right there.

BY MR. ELEAZER:

Q. Mr. Grimes, the information you have —

THE COURT: Like you have been doing.

MR. ELEAZER: I'm not going to lead him, sir.

THE COURT: Again.

MR. ELEAZER: Again.

THE COURT: All right.

BY MR. ELEAZER:

Q. Mr. Grimes, the information that you possess which the Court has ruled was not admissible under the attorney-client privilege, in your legal opinion if that information were divulged in court would it be beneficial to the defense of this case?

MR. MCINTOSH: I object. That calls for —

MR. ELEAZER: He is an attorney.

THE COURT: I understand. That's not a proper question, Mr. Eleazer.

MR. ELEAZER: All right, sir.

(Tr., p. 118, line 24 — p. 126, line 19.)